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## COMBATting CORRUPTION IN AFRICA: INSTITUTIONAL CHALLENGES AND RESPONSES June 1997

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# **Combatting Corruption in Africa: Institutional Challenges and Responses**

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Global markets in goods, services, and capital are rapidly becoming a reality. In this brave new world, countries that wish to remain leaders, and those wanting to catch up to them, must place a high premium on innovation, entrepreneurship, and the mobilization of domestic and foreign capital. This means developing people, infrastructure, and markets. What makes success possible is the kind of public leadership and governance that inspires confidence and encourages risk-taking.

These qualities exist in some countries and not in others. Research increasingly demonstrates the impact of good governance (or at least the perception of it) on growth in investment and other economic indicators. African countries prominently appear among the countries at the low end of both growth and governance scales.<sup>1</sup> Readers are familiar with many of the reasons for this. One of the important reasons is that failures of governance raise costs and deter investment. These failures include: policies that are not stable, contracts that cannot be enforced, property rights that are unclear or expropriable, and bureaucratic intrusions that are neither controlled nor predictable.

Many of these failures can be described as *corruption*. A simple definition of corruption would be *the abuse of public office for private gain*. One should keep in mind that an abuse of a public office usually involves both an official and a private citizen, and that corrupt gains can take many forms and are not limited to money.

Corruption in Africa appears to be both pervasive and harmful:

- ▶ African officials and observers participating in a 1996 workshop cited corruption as a major problem in the management of public companies, government procurement, fiscal administration, customs, and justice.<sup>2</sup>
- ▶ In Sierra Leone, nearly 80 percent of respondents to a survey agreed that money and influence determined the outcome of judicial decisions.<sup>3</sup>
- ▶ In Uganda, a Public Sector Review Commission found 42,000 “ghosts” on the public payroll- civil servants who had retired, died, or never existed but were being paid.<sup>4</sup>

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<sup>1</sup>P. Mauro, “Corruption and Growth,” *Quarterly Journal of Economics*, August 1995; P. Keefer and S. Knack, “Why Don’t Poor Countries Catch Up? A Cross-national Test of an Institutional Explanation,” IRIS Working Paper, University of Maryland; Transparency International, Internet Corruption Perception Index. <http://www.GWDG.DE/~uwwv/icr.htm> (29 April 1997).

<sup>2</sup>IRIS Center, *Governance and the Economy in Africa: Tools for Analysis and Reform of Corruption*, . 46-7 (1996).

<sup>3</sup>S. Kpundeh, *Politics and Corruption in Africa: A Case Study of Sierra Leone*, p. 112 (1995).

<sup>4</sup>P. Langseth, *Civil Service Reform: Lessons Learned* (EDI Working Papers, 1995).

- In Guinea, by one estimate, some U.S. \$100 million is lost each year due to fraudulent government procurement practices.<sup>5</sup>

This does not mean that corruption is an African disease, nor that corruption doesn't exist in every other region of the world. On the one hand, at independence, African societies inherited corrupt public institutions from the colonial regimes, which were governed for the benefit of foreign economic and political interests, without accountability to the local population. Moreover, there are indigenous systems of governance in Africa that operate under strict rules of integrity and accountability. On the other hand, corruption has figured in every society's history. In the nineteenth century, public benefits and public offices were routinely (though not openly) bought and sold in most Western countries. Until the mid-twentieth century (and in some cases beyond), North American cities were rife with patronage, bribery, and embezzlement. Indeed, the expectation of clean government in countries such as Japan, Germany, Britain, and the United States is a fairly recent one.<sup>6</sup> However, this expectation is now an international standard, and is being codified into domestic and international laws dealing with the conduct of business across borders.

The task of taming corruption is therefore a large and urgent one in Africa, but not an unprecedented one. It consists of building indigenous and international standards of integrity into the public institutions of the state. Clearly, this is a battle that must be waged on several fronts. The purpose of this paper is to take the large and varied phenomenon of corruption, and break it down into components more easily subject to legal and policy analysis. The core tenet of this paper is that taming corruption means changing public institutions -- that is, rules and the organizations that implement them -- to make governance clean and accountable. While some insights apply across the board, different forms or risks of corruption require different responses. This paper analyzes examples of corruption and describes institutional changes that should make it possible to combat them. The discussion of institutional reforms is divided into one part dealing with long-term fundamental change, and another dealing with more specific changes that might in some cases be adopted in the near term.

Two related points are made briefly in this paper, but are discussed more completely in other papers and presentations. First, the institutional changes discussed below help provide a foundation for market-enhancing governance, and hence increased investment and growth. Second, carrying out these changes often requires not only knowledge but vision, leadership, and courage.

### ***Analyzing Four Kinds of Corruption***

Corruption has many faces, and vigilance is required in virtually every sphere of public life to control it. This section presents an analysis of four categories of corruption that are common in Africa and other parts of the world. These examples indicate how institutional and policy changes can be identified on the basis of an understanding of particular forms of corruption. The categories and examples used here are obviously not exhaustive. Other forms of corruption, such as the exchange of favors for campaign

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<sup>5</sup>UNDP, *Finances Publiques et le Developpement Humain: Etude Complementaire*, p. 137 (presented at *Atelier National sur le Developpement Durable*, Guinea 1995).

<sup>6</sup>See J. Noonan, *Bribes* (1984).

contributions may be equally important in some societies. The examples that follow illustrate a general approach that can be applied usefully in several areas of direct relevance to African countries. The two subsequent sections of this paper build on this discussion, taking a broader look at institutional reforms that can help sustain good governance.

### *Bribery in Investment Approval*

The startup of new businesses, especially those involving sizeable investments in plant and equipment, face a number of approvals. These could include obtaining company charters, business licenses and registrations, regulatory approvals, real estate, zoning permits, foreign exchange accounts, tax exemptions, free zone benefits, and other steps, depending on the type and status of the enterprise. However, the number of steps and the amount of time each of them takes varies greatly across regions and countries. In Peru, DeSoto counted 11 basic steps, taking more than nine months, to set up a small formal industry in the 1980's -- not including any specialized permits required for certain types of industries or any additional steps required for large investments.<sup>7</sup> A recent study of medium and large-scale investment project approvals in Tanzania counted 28 essential steps causing startup delays of 18 to 36 months, as compared to 12 to 24 months in Ghana, and 6 to 12 months in Namibia.<sup>8</sup> The opportunity costs imposed by these delays are substantial -- one could imagine the gains to the economy and the treasury if these time frames were reduced by half, three-quarters, or more.

Moreover, each of these steps is potentially subject to bribery. At each point in the chain of approvals is a bureaucrat who will often -- *de jure* or *de facto* -- have the power to grant, expedite, delay, or deny the approval. If the applicant is in a hurry and the bureaucrat has a backlog of other applications to review, there is the basis for a mutually-beneficial trade: the applicant pays the bureaucrat under the table to speed the approval. These "speed money" payments can easily become a form of extortion, as bureaucrats begin demanding money in order to take action, or more subtly, deliberately slowing their processing in order to attract bribes. They might also conspire with their superiors to create or maintain overly complex procedures in order to attract illegal payments, to their mutual benefit.

**Impact:** Here, an immediate benefit accrues to the corrupt bureaucrats. The private sector applicants suffer the immediate harm. One might be tempted to look upon the expedited processing as a benefit that the applicant is willing to pay for, and to view the transaction as *efficient*. However, implicit in this is the assumed presence of a slow and corrupt approval process, which an applicant can efficiently evade through bribery. A broader perspective, of course, shows that the applicant would be in the best position if the approval step in question either did not exist or were clean and efficient. Therefore, private sector applicants suffer the immediate harm, and should have an interest in a reform of the approval process.

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<sup>7</sup>H. de Soto, *The Other Path* p. 135 (1989).

<sup>8</sup>R. Rauth, M. Spence and G. Morrill, *The Investor Roadmap of Tanzania* p. v (Coopers & Lybrand draft report to USAID, 1996).

What is the broader impact of this kind of bribery? Unlike the last two types of corruption that will be reviewed here, bribery in this case is largely *petty* rather than *grand*, that is, individual bribes are relatively small on a per transaction basis. Otherwise, they would not be paid. However, this type of bribery, especially in developing countries, can easily turn from being a series of isolated incidents to a *systemic* problem, where overall costs escalate significantly. Most immediately, this causes delays in the approval process, hence lost production and employment. The opportunities afforded to corrupt actors by these bureaucratic checkpoints attract more official participants in search of corrupt gains, and the system becomes increasingly predatory, unpredictable, and untrustworthy.

Bribery in Investment Approval	
Immediate Benefit	Corrupt officials
Immediate Harm	Applicants
Broader Impact	Delays and transaction costs Predation by bureaucrats Entry barriers Innovation discouraged
Causes	Non-market criteria for allocation Monopoly or independent monopolists Complex procedures can be made more complex No surveillance, low penalties Low pay and status of public servants Patronage
Responses	Competition/overlap Simplify procedures Appeal/complaint procedures Strengthen administrative law Criminal law enforcement Raise civil service pay and standards
Feasibility of Change	Social expectations of civil servants hard to change Requires honest mid-level officials Cooperation of private sector/civil society possible

In some systems, there is little or no check on these new entrants. Indeed, the incentive structure of low public sector wages, tolerance of corruption, lack of effective criminal sanction, and the expectation that all public servants will support large kin groups, weighs heavily in favor of participation in bribery and extortion. Where this is the case, the possibility exists of runaway corruption, as new entrants at different links in the chain of investment approvals charge high bribes without regard to the overall cost to the applicant.<sup>9</sup> This scenario assumes that each bureaucrat controlling a link in the chain has a monopoly on

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<sup>9</sup>S. Rose-Ackerman *Corruption: A Study in Political Economy* p. 167-186 (1978). Schleifer and

granting that particular approval, and that mechanisms of review and appeal are ineffective. This combination of circumstances is far from rare. These mounting approval costs can make the creation of a legally formal business excessively costly, and as a result some new investments are not made, or enterprises are carried on informally, with negative effects on efficiency and on public revenues.

In short, corruption becomes an entry barrier. Not only are large projects and inbound foreign investments deterred, but modest enterprises find that they do not have the means or the personal connections to establish their businesses formally. Where an official controls a key step in the approval of a large project, the bribe demanded or the uncertainties created are sometimes so great as to stop the project. Depending on its intensity and its association with other obstacles to business formation, corruption could be an important factor impeding the establishment of businesses of all sizes, with deleterious effects on job creation, tax receipts, and growth.<sup>10</sup>

**Causes and Responses:** In order to formulate the most appropriate responses to bribery in the investment approval process, one needs to determine its causes. The most obvious cause is the existence of this chain of approvals in the first place. In this process, approvals are given or denied to potential market entrants according to *non-market criteria*, e.g. site zoning rules, compliance with labor or product standards, or one's place in the queue for the next available certificate or permit. Where this is the case, each party in the approval process will have a motive to advance its interests through mutually-beneficial transactions, namely bribes that ensure the bribe-giver approval or expedited treatment, and provide supplemental income to the bribe-taker.

There are a number of responses to this. Approvals that have survived an earlier period of central planning or industrial policy, and that no longer have a rationale in a restructured economy, should be eliminated. Once the steps are minimized, in some cases market forces can be introduced by formalizing what used to be bribe payments into a scale of graduated payments. Many jurisdictions in the U.S., for example, provide two levels of fees for normal and expedited processing of official document requests, such as for notarized corporate charters and filings. Formalizing "speed money" in this way introduces market forces, while allowing higher fee payments to flow directly into the treasury rather than into an official's pocket. Equity considerations, of course, make it inadvisable to do this in certain areas.

A second major cause of corruption in this area is the existence of *monopoly* power over approvals at some or perhaps all the steps in the process.<sup>11</sup> Here, a single office or even a sole bureaucrat controls the grant or denial of permits. In some cases this may be unavoidable as a practical matter, and it may not present a problem if certain other conditions are met, i.e. this approval point is staffed by civil servants who are reasonably paid and imbued with a professional ethic, appropriate control mechanisms exist, and effective legal restraints are in place. However, all of these conditions might not be met, or are not feasible in the short

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Vizhnay, "Corruption." *Quarterly Journal of Economics*, 1993.

<sup>10</sup>See M. Alam, "Some Economic Costs of Corruption in LDCs," *Journal of Development Studies* (1990); IRIS, *Governance and the Economy in Africa op cit.* P. 20-21 (1996).

<sup>11</sup>R. Klitgaard, *Controlling Corruption*, p. 74-75 (1988). Rose-Ackerman, *Corruption op cit.* p. 109-136 (1978).

term, for example, in many low-income countries now undertaking reforms. In this situation, an effective strategy might include injecting another market force into the system: competition.

Several forms of competition are possible. One would be to provide more than one office or official with overlapping authority, and to allow applicants to take their business to whichever one they choose. Here, barring collusion by all officials involved (always a possibility), an applicant who faces delay or extortion can exercise an *exit* option, taking the application to an alternative processing point to obtain honest and efficient service. The existence of one or more honest administrators will help drive bribery out of the system, or at least competition should put downward pressure on bribe prices.<sup>12</sup> Competition is possible only where more than one source exists *for the same approval*. Where several sequential approvals are required by different offices, this alone does not create competition, and indeed if the process is corrupt, the proliferation of steps makes uncontrolled bribery possible. Apart from eliminating steps, possible responses would be to introduce competition at each step, or to consolidate the steps into a *one-stop* process that can be handled by one agency with strict controls on it, or at a number of competing agencies or branches.<sup>13</sup>

Another alternative would be to privatize certain systems, or at least to allow private competition. A well-known example from another field is the flourishing of private international express mail services, which offer a speedier but more expensive alternative to public postal services. While a government would not privatize its administrative process, there are examples of governments privatizing filing and registration systems where certain legal rights depend on a valid filing. Examples include company and lien registration in parts of North America and Scandinavia. Here, the government acknowledges what an inefficient and predatory public sector could never admit: that some administrative tasks are mechanical, and that the introduction of bureaucratic deliberation or discretion into the process only creates opportunities for delay and corruption. The problem of constraining discretion will be discussed further below, but privatization and private sector alternatives can restrain opportunistic behavior in the approval process. Indeed, if a specific processing or registration system (whether public or private) is self-financing, the need to compete for fee-paying customers could impose discipline even in the absence of overlapping authority, if other exit options are available, such as informality or setting up operations in another jurisdiction.

Monopoly power exists in the exercise of many government functions because introducing competition is not feasible or for other reasons, political or practical. In these situations, other ways must be found to constrain *bureaucratic discretion*. If, as a legal or practical matter, an official can freely determine the timing and basis for an approval decision, the door is open to the purchase and sale of speedy and

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<sup>12</sup>This may be an effective response to delay and extortion leading to bribery in return for *legal benefits*, that is, public benefits or public services to which the applicant has a legal entitlement. In the case of bribery for *illegal benefits*, discussed below, setting up competing authorities could have the opposite effect. In that case, the existence of any dishonest administrator allows the applicant to circumvent all parallel processing points that are being administered lawfully -- and so competition in these circumstances could make corruption more likely. *Id.* p. 170-183.

<sup>13</sup>Caution is warranted when evaluating the benefits of the *one-stop shop*. If the agency merely consolidates a series of unnecessary steps, or otherwise acts as a gatekeeper rather than a facilitator of investment, then its purpose is defeated. Either the effort and resources required for it are being wasted inadvertently, or its underlying purpose is really to serve as a vehicle for patronage and corruption.



favorable decisions through bribery. The most obvious way to limit this discretion is to take all or part of the decision out of the official's hands in the ways discussed previously. The other way, of course, is to impose *accountability* on the official, either through fixed time limits on approval decisions, rigid rules of approval or denial, or at least the requirement to justify decisions according to a set of legal or administrative standards.

In order for such standards to be effective, they must be enforceable through supervision, inspection, and sanction on the one hand, and on the other hand, through appeal against administrative action. The risk to a corrupt official -- or a corrupt applicant -- of discovery and punishment should be high enough to offset the potential gains. Virtually every country in the world has administrative and criminal laws on the books that provide for sanctions. But, there are two problems. First, judiciaries and prosecutors often do not have the political independence, nor the necessary *de facto* power and material resources, to enforce their decisions. Second, punishment does not work well as the primary instrument in the fight against corruption. Commitment, leadership, and institutional changes that alter official value-systems and incentives need to come first. Beefing up enforcement to discourage non-compliance can work as a complement to this.

The processes of appointment and rule-making play a critical role in shaping the behavior of the bureaucracy. In a dysfunctional system where government posts are sought for their corrupt earning potential, higher officials have an interest in handing them out to ethnic or political cronies as a form of wealth-sharing. The recipients of the posts receive salaries that are sometimes so low as to be meaningless. These bureaucrats earn their main income through bribes, and perhaps other means such as moonlighting and embezzlement, and this allows them to support extended families and to provide a share to their superiors, all of whom expect to benefit from the bureaucrat's position. In this situation, line bureaucrats and their superiors have a shared interest in making the process of approval as lucrative as possible. As a result, regulations are created or manipulated in ways that maximize the complexity and minimize the transparency of the process. The ability to multiply rules and complications enables officials to create delay and to exercise discretionary choice among several applicable rules -- examples include industrial classifications, zoning rules, tax exemption categories, and tariff schedules.

These two related problems require two kinds of responses. First, civil service pay, appointment procedures, and ethical standards need to be revised in order to minimize patronage, protect the autonomy and neutrality of officials, and instill professionalism. Second, while approvals are kept to a minimum, the rules governing each step in the process need to be kept simple. This has both substantive and procedural dimensions. While a simple and clean process may be envisioned by the law, if administrative procedures do not impose discipline by keeping all regulations within the law, requiring transparent procedures and public comment in the elaboration of the regulations, and holding officials accountable under the laws and regulations, then the law will not control bureaucratic behavior, and discretion will reign. Corruption will fill the void.

**Feasibility:** It's all very well to list steps that need to be taken, but are these measures feasible? There is reason to believe that reforms and anti-corruption efforts may be easier in the area of investment approval than in other areas. This is mainly because very few, if any, people outside government benefit from this kind of corruption, and many are directly harmed. In any country, there will likely be a large number of people who have experienced delay or extortion in dealing with some steps in this approval process. Depending on the size and political stance of the business community, its members could be organized to cooperate with reformist leadership to change the system, and can be expected to report or appeal

bureaucratic malfeasance where channels are available for this -- and there is no fear of retaliation.<sup>14</sup> Recalcitrant officials and their political allies can be expected to resist reforms, ignore appeals, and block or coopt attempts at oversight or prosecution. Here, high-level institutions of accountability, such as constitutional protections and checks, an independent judiciary, administrative procedures, and a politically neutral civil service become directly relevant to the fight against corruption. These will be further discussed below.

### ***Bribery in the Judicial System***

Corruption in the judicial process exhibits some distinctive features which affect the choice of responses. The previous section dealt with bribery in the chain of approvals for business startups and investments. In that case, applicants pay bribes to avoid delays and extortion that may intervene in the process of obtaining approvals to which the applicants are legally entitled. That same dynamic may also apply in such areas as obtaining police protection, health services, tax refunds, or drivers licenses. The judicial process could also be subject to this kind of corruption in dealings between private individuals or firms, on the one hand, and government on the other. Examples include clerical functions such as the provision of marriage certificates and documents of title, civil suits against the government, criminal investigations and trials, appeals of administrative action, and privatization-related adjudications in such areas as the valuation of state-owned enterprises and the sale of state lands. In these areas, the analysis and the required responses would generally be similar to those discussed above -- although in all areas, specific responses must be tailored to the unique facts of the situation.

The other type of judicial corruption involves the making of illegal rulings in return for favors. Payments are made to judges, or some other benefits are conferred in return for, or in expectation of, a favorable ruling that may not be warranted by the law or the evidence. In some cases, this may be a straightforward *quid pro quo*, i.e. payment for a specific result. In other cases, payments may be made, or other favors conferred, as a kind of insurance against a possible unfavorable result. In yet other cases, the exchange may be a bit more vague, for example, where private parties curry favor with judges the same way they might with legislators, giving favors on the understanding that the judges will look out for their interests. This is likely to be illegal in any given country, and whether illegal or not, the clear impropriety of it forces people to do it in secret. Finally, here, unlike the examples discussed in the previous section, both the private party giving the bribe and the judge receiving it benefit -- they have a common interest and they collude to keep it secret.

**Impact:** While the principals to this transaction both benefit, third parties suffer immediate harms due to the miscarriage of justice. What expectation there may have been of equal justice and due process disintegrates, along with the reputation and legitimacy of the legal system. When the level of respect for and trust in the judiciary is low, the level of willing compliance with the law among the populace suffers as well. Evidence of judicial bias or corruption can also cast doubt on past verdicts, thus creating costly disruptions

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<sup>14</sup>An example is the campaign against illegal road payments in Niger, which involved cooperation between official reformers and truckers subject to demands for bribes. IRIS, *Governance and the Economy in Africa op. cit.* p. 75-89 (1996).

and retrials.<sup>15</sup>

Furthermore, where the judiciary is reputed to be corrupt, business people will often take account of this. If only paying customers and the well-connected are protected by the courts, or the courts are generally unreliable, business transactions will tend to be carried out in a way that puts a premium on avoidance of the courts. Risk premiums may increase, or transactions may not go forward without some guarantee that private arbitration will keep disputes out of local courts. Transactions may gravitate towards either self-enforcing deals such as spot-market sales, or vertical integration, rather than run the risk that attempts to restrain the potential opportunism of contracting partners will bring the transaction before the courts. One way of gaining this assurance would be for tight-knit social or ethnic groups to contract only among their members.<sup>16</sup>

These strategies tend to raise the costs or limit the scope of business transactions. Many investments that are "asset-specific" or "contract-intensive," that is, where the risk of opportunism is great and courts are likely to be an important factor in protecting against that risk, may not be made at all. Examples would be production agreements that require non-fungible investments in plant and equipment, and long-term secured loans. Where these types of transactions are discouraged, economic gains are forgone.<sup>17</sup>

Bribery in the Judicial System	
Immediate Benefit	Corrupt judges Corrupt parties
Immediate Harm	Other litigants
Broader Impact	Judicial legitimacy damaged Legal compliance suffers Contract enforcement unreliable Investment discouraged

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<sup>15</sup>See, e.g. L. Greenhouse, "Justices Consider how the Taint of a Corrupt Judge Should be Measured and Remedied," *New York Times*, p. A18, April 15, 1997.

<sup>16</sup>See J. Landa, *Trust, Ethnicity, and Identity: Beyond the New Institutional Economics of Ethnic Trading Networks, Contract Law, and Gift Exchange* (1994). Kahkonen and Meagher, "Legal Institutions and Efficient Contracting in Africa". (draft paper, USAID EAGER project, 1997).

<sup>17</sup>See: Williamson, *The Economic Institutions of Capitalism* (1985); C. Clague, P. Keefer, S. Knack, M. Olson "Contract-Intensive Money: Contract Enforcement, Property Rights and Economic Performance" (IRIS Working Paper #151, 1995).

<b>Causes</b>	Low judicial status and pay Dependent and compliant judiciary Unclear laws and regulations broaden discretion Procedure can be manipulated Absence of credible sanctions
<b>Responses</b>	Raise status and professionalism, starting at top Guarantee independence Reform appointments Simplify and codify laws and regulations Strengthen appeals courts Discipline corrupt judges and litigants
<b>Feasibility</b>	Requires commitment of top leadership May require constitutional change Some opposition by vested interests Long-term economic and political gains potentially large

**Causes and Responses:** Again, in order to formulate possible responses, one needs to determine the causes of this kind of corruption and address them. The causes often include the low status and low pay of judges (at least at low to mid-levels) within a system where patronage is rewarded by shared benefits. The gains from corruption are potentially great, if not a necessary part of one's expected remuneration. At the same time the risks of detection and punishment may be low, or at least skewed in a particular direction. For example, judicial bribery may be overlooked, while any attempt by the judiciary to blow the whistle or refuse to do the bidding of political figures (what has been called "telephone justice") may result in dismissal or prosecution on trumped-up charges. The response to these problems would have to include long-term reform of the judicial appointments process, a package of pay and other material benefits that enables judges to act independently, and a high-level commitment to an honest, independent, and professional judiciary. In many African countries, this would involve not only the commitment of resources but changes in constitutional and organic law.

One also confronts the problems of monopoly and discretion in this field. Where justice is sold in private litigation, there is a party that benefits and another that is harmed. Monopoly itself is addressed in many judicial systems through the rules of jurisdiction and selection of forum. For example, the doctrine of *forum non conveniens* at common law provides a basis for a party to argue that a case should not be removed to a particular jurisdiction because that party's interests might thereby be harmed by a prejudiced, incompetent, or corrupt judicial system.<sup>18</sup> The civil law system, at least in France, is even more distrustful of judges. Appeals in the Anglo Saxon system are accepted only on matters of law, which could include prejudicial application of the law. The French system goes further, providing for review of both law and fact at the first level of appeal, and, under the system of *renvoi*, for the transfer of cases to new courts for

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<sup>18</sup>See, e.g. Affidavit of Marc Galanter, *In re Union Carbide in Mass Disasters and Multinational Liability: The Bhopal Case* (Indian Law Institute, 1986).

rehearing after *cassation*.<sup>19</sup> On appeal, the record is re-examined, and irregularities, including suspicions of corruption, can be discovered and referred for the necessary action.

Of course, appeal and the ability to remove a case to another forum are two-edged swords. A party that intends to obtain satisfaction from the court system dishonestly may be either harmed or helped by such a system, depending on the circumstances of the case. If this party's approach to the judge of first instance was rebuffed, or if the judge accepted a favor but failed to live up to his or her side of the bargain, then a system of removal or appeal can conceivably help the corrupt party keep the case going until it finds a judge that is willing to comply. This is why it is especially important for anti-corruption efforts to focus on the control, oversight, or "wholesale level," and why many of the best jurists in Western judicial systems are at the appellate level. This discussion also shows that judicial corruption can operate by conferring a diverse array of benefits on a corrupt party -- a verdict in the first instance, an unduly high or low damage award, a reversal on appeal, endless delays, dismissal on a technicality, etc. There is necessarily a certain scope for judicial discretion in all these areas. Therefore, in addition to the responses discussed above, it is critical to the maintenance of a clean judiciary to have laws and regulations that are clear, not unduly complicated or contradictory, and which provide a practical tool for the evaluation of a judge's decision upon appeal. Administrative oversight by an autonomous body such as a judicial council including representatives of the judiciary, legislature, and executive, with clear standards for referral of cases for criminal investigation are another necessary part of the control system here.

**Feasibility:** What issues of feasibility arise here? Two very large obstacles loom. First, if there are no real political checks and balances, for example if a government under a dominant ruling party wants to exercise its power through a constitutionally dependent and compliant judiciary, there is little to stop it. Here, the judiciary is a tool of power, and in this situation, power will determine the extent of tolerable corruption (frequently a large one) and of judicial independence (usually a very small one). Second, the exercise of judicial power is not like the award of permits. It involves the interpretation of often complex factual situations, and sometimes also the application of many overlapping laws that require interpretation to resolve questions of applicability and potential inconsistency. In this area, providing a check on monopoly power, constraining discretion, and imposing accountability through such mechanisms as appeal and criminal sanction can help. But this will not be enough. A cadre of elite and incorruptible judges, operating in a system that guarantees their independence as well as sufficient means for them to exercise it, is the *sine qua non*. The place to start is the very pinnacle. Integrity and accountability will flow down from there, especially if matched by an active popular expectation of clean and competent justice. This has been the case, for example, in the United States, where federal courts and prosecutors have helped bring about relatively clean judicial systems and administration at both the federal and state levels. It is also increasingly the case in Europe, where top national judges and the European Court of Justice have imposed accountability on judges and administrators under criminal, constitutional, and European Union laws.

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<sup>19</sup>This was automatic in all cases until the 1960's. Now, this form of transfer is more selective. A. Von Mehren and J. Gordley, *The Civil Law System* p. 104-7 (1977).

## ***Bribery in Government Procurement***

Government contracting plays an important role in any economy, but it is especially critical in developing countries. As restructuring has reduced the scope of state activity, investments in infrastructural development and core public services are increasingly being handled by the private sector, frequently through public procurement contracts. At the same time, government procurement is especially susceptible to *grand corruption*. Most of the discussion thus far has been about *petty corruption*, that is, favors and payments that change hands day-to-day, normally in comparatively small individual amounts (although larger amounts may be involved, for example in important court cases). As we've seen, this can have a devastating cumulative effect. Grand corruption, by contrast, involves large sums in individual transactions in which huge rents are at stake -- big infrastructure projects, natural resource concessions, monopolies, or changes in tax or industrial policy that direct large windfalls to special interests.

Procurement fraud and corruption take many forms, including collusion and bid-rigging on the private sector side, as well as payoffs to government officials for the award of particular contracts. Here, we focus on the latter. Typically, an infrastructure project will be directed toward an influential contractor by high officials -- members of parliament, ministers, or even the chief of state. The public works authority and the relevant high officials receive payments or other favors, in return for which they secure the award of the contract to the particular firm. The firm then must recoup the costs of these payoffs, and its profits, from the revenue of the project. This may mean that the contractor, having inflated its bid, engages in wholesale overinvoicing, marking up the cost of each component in order to extract its rents and recover the payoff money. Alternatively, the contractor may invoice within the expected range, but skimp on the quality or quantity of materials, or on labor. In the former case, scarce funds go to waste -- either tax revenues, or more likely in the case of Africa, international donor funds or loans. In the latter case, the quality, safety, and longevity of public works is compromised, the infrastructural benefits are soon lost, and more public funds may have to be invested in repair or replacement.

**Impact:** Since the corrupt bidders and corrupt officials collude, this seems in a very narrow sense to be a victimless crime. However, competitors of the corrupt bidder (if they exist) suffer immediate harm, having lost an unfair competition. The broader harms of this are many. Public works contracts are awarded for the wrong reasons and produce the wrong results: unjustified costs and/or inadequate results. In either event, public resources that might have gone into productive investments are wasted. Something also happens here that is similar to what was discussed previously: the prospect of corrupt rents draws more actors and activities into this area. Not only the process of awarding contracts, but the focus of public investment itself becomes distorted: instead of low-cost schools, dispensaries, and staff, resources may flow into expensive and complicated "white elephant" projects -- dams, airports, government buildings -- and military hardware. Real public investment needs are not met. Meanwhile, payoff requirements, overinvoicing, and the need to keep corrupt transactions secret (e.g. by the use of commission agents or money laundering schemes) raise the costs of these projects. These losses help drain the treasury and create an unsustainable debt burden -- without the increases in productivity needed to pay them off. Here, corruption plays a role in perpetuating macroeconomic instability, slow growth, and poverty.<sup>20</sup>

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<sup>20</sup>IRIS, *Governance and the Economy in Africa* op cit. p. 16-23 (1996), Transparency International, *National Integrity Systems: The TI Sourcebook* p. 75-84 (1996).

Bribery in Government Procurement	
<b>Immediate Benefit</b>	Corrupt officials Corrupt bidders Political elites
<b>Immediate Harm</b>	Some bidders (competitors)
<b>Broader Impact</b>	Distortions Resources wasted or drawn away from development-related investments Unsustainable budget deficits and debt
<b>Causes</b>	Design and bid procedures allow discretion No accountability for award decisions Quality inspection ineffective No audits or case review Low penalties Powerful political interests control the process
<b>Responses</b>	Tighten design and bid procedures Documentation requirements Audits and quality inspections Toughen penalties Multiple checks/signoffs Whistleblower incentives Strengthen bid protest procedures Decentralize/privatize
<b>Feasibility</b>	Big rents for bureaucrats and firms Powerful political networks resist Mobilizing competitors may be possible

**Causes and Responses:** In this case, the causes of corruption and the types of response called for are different from those discussed previously. While low-paid public servants may be part of the picture, the real motivation is not subsistence but greed, and the real players are big firms and high officials. The rents at stake in government procurement have made it a difficult area to control in every part of the world. Within the last quarter century, a Vice President of the United States resigned and was jailed for having accepted his share of rents or "kickbacks" from corruption in government procurement, and government contracting scandals have erupted in most of the industrialized countries as well as many developing countries such as India and Pakistan. However, a scandal is not the same as a way of life. The harm imposed on an industrial country by a major defense contracting scandal is minor when compared to endemic public works corruption in an African country, where a significant proportion of public resources may be diverted to pay for luxuries, or deposited in offshore bank accounts. Greed that can inflict this kind of harm goes beyond the prescriptions available to most policy analysts. It implies a fundamental change in the way politics and bureaucratic business are handled.

Fortunately, there are relevant precedents. Political changes in some Western and Asian countries, for example, have brought in reformist leaders who made serious inroads on corruption by changing the

systems. As the major cause of grand corruption in government contracting is a failure of accountability at the highest level, then change must begin at the top. Assuming political will at this level, then the major tasks become insulating the civil servants in this area from political pressure, and constraining discretion and imposing accountability on the contracting process. As in the case of the judiciary, the priority here would be to create an elite cadre of professional civil servants at the top level, and to change the appointment process along with the ethics rules and salary packages accordingly. The sanctions for bribery will need to be real, which implies a justice system that is also insulated from political manipulation. Some countries have used certain presumptions to snare corrupt officials -- for example an overly lavish lifestyle or the movement of large amounts of money in and out of bank accounts<sup>21</sup> -- but these are potentially subject to abuse. Bid procedures and award standards need to be tightly crafted so that procurements cannot easily be designed ("wired") with a specific contractor in mind, the elements of evaluation are handled uniformly by specialists, and exceptions to technical and cost criteria are allowed only in strictly controlled circumstances.

Finally, both audit systems and quality inspections are needed for effective control. Improved accounting and auditing can constrain discretion on one side. However, procurement fraud that relies on shoddy workmanship or withholding materials rather than inflated bids and invoices will not necessarily be discovered through audit systems. It will require on-site inspections and monitoring. Depending on the location of the site, this could be difficult or impossible under current arrangements. Moreover, if higher-level patrons control the outcome of audits and inspections in order to protect corruption, then these systems will have little impact. An alternative may be to decentralize some public works responsibilities, or perhaps to cooperate with nongovernmental watchdog groups who monitor public works projects from the outside.<sup>22</sup>

**Feasibility:** Not all of this will necessarily be feasible for most African countries now. The threshold issue is whether there is any commitment at the top to cleaning up this area. If such is the case, reform would no doubt still face obstruction by powerful political forces in the governing coalition and the private sector. To the extent that foreign firms are implicated, there is some leverage if they are Western firms, as the U.S. Foreign Corrupt Practices Act makes international bribery illegal for American firms, and there is serious movement toward such a standard in Europe and the OECD generally. While a large group does not suffer direct harms as in the case of bureaucratic predation and extortion, illicit gains in the procurement area can become a political "hot button" that mobilizes voters and watchdog groups. These groups can play a role in monitoring the cost and quality of public works projects. Moreover, the motivation of those directly harmed by corruption in the procurement process can be tapped. If the procurements where bribery takes place are competitive, then firms that lose competitions as a result of corruption should have the option to protest if they have evidence of irregularities. Bid protest procedures should be created or strengthened, and the integrity of administrative and judicial personnel who handle the protests protected. An additional way to mobilize aggrieved parties to police the system is to strengthen the incentives for honest public servants to report irregularities that they encounter. These "whistleblowers" require special protection, as they are often subject to reprisals.

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<sup>21</sup>Hong Kong's Independent Commission Against Corruption benefits from this type of presumption. Klitgaard, *Controlling Corruption*, *op. cit.* p. 120 (1988).

<sup>22</sup>Uganda is now undergoing such a decentralization process, including the establishment of local tender boards.



### *Misappropriation of Public Resources*

This type of corruption would include embezzlement of government funds, theft of other public resources, civil service fraud, and other corrupt practices occurring within the public sector. Unlike the other areas discussed above, this generally does not involve private sector participants, hence no one outside government obtains immediate benefits or suffers immediate harm. The beneficiaries are public sector employees, although their gains are likely to be shared with higher-level appointed or elected officials as a condition of employment. One could aptly characterize this as a kind of bribery within the public sector, since it involves an illegal exchange of payments for benefits. This is also closely linked to other forms of bribery affecting private citizens, as they provide the earning potential of the lower level posts. Another form of public sector reciprocity is more like extortion: in highly centralized governments -- typical in most of Africa -- lower-level officials may be forced to pay off higher level officials who hold the exclusive right to approve projects, plans, and budgets.<sup>23</sup> Theft and embezzlement also involve cooperation. Officials who engage in this activity -- e.g. skimming tax revenues, misusing government offices and equipment, or manipulating public budgets and accounts for their own profit -- need others who would be in a position to know to look the other way. Colleagues, supervisors, and government inspectors and accountants would need to be paid off or restrained by powerful patrons higher up in the ranks in order to remain silent.

**Impact:** The harms of this are many. Since all of this happens within the public sector and the political hierarchy, private citizens are not directly extorted or harmed by unfair advantages given to others. However, bribe-seeking and extortion are by-products of this system, and officials' preoccupation with stealing and rent-seeking makes the delivery of government sector services a secondary issue. The client is therefore neglected, as public officials become less attentive, more dilatory, and more predatory. As in the examples cited previously, this further diminishes the legitimacy of government, thereby encouraging non-compliance and evasion. Government property and funds go to waste, and costs rise as these are replaced, and as the public sector wage bill balloons to accommodate patronage hires and nonexistent "ghost" employees on the payroll. As in other areas, policymaking and implementation become distorted as members of the public sector seek the richest sources of rents rather than the best policy results. Inflated operating costs due to top-heavy government staffs, as well as the leakage or misuse of funds, manpower, and material squeeze out productive investments in social sectors and infrastructure, and add to the national debt.

**Causes and Responses:** The two major causes at work in this area are, first, the capture of the bureaucracy by high-level political interests and patronage networks, and second, the failure of controls on expenditures, payroll, and inventory. The first issue was discussed previously. The problem of controls arises acutely almost everywhere in Africa. As stated earlier, public sector corruption in Africa is a continuation of a colonial legacy, intensified by instability, political conflict, and growing poverty. Even apart from the existence of political will to make controls effective -- which is the heart of the matter -- it appears difficult even for well-intentioned public managers to obtain accurate and usable information on accounts, inventories, and wage rolls. Accounting systems are often outmoded, staffed by personnel with inadequate skills, and subject to manipulation. Accounts in many countries can be turned in years late, with

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<sup>23</sup>G. Korsun and P. Meagher, "Decentralized Finance and Governance in West Africa" (Draft report to USAID, 1997).

impunity. This is a result not only of high-level protection but also of the inadequate powers of compulsion and sanction placed at the disposition of auditors, inspectors, and prosecutors.<sup>24</sup> The answers here are likely to include a combination of improved accounting systems; increased autonomy, powers, and material resources at the disposition of government auditors; and an appropriate level of decentralization that brings to bear the incentives of local populations and elected officials to manage public resources wisely.

<b>Misappropriation of Public Resources</b>	
<b>Immediate Benefit</b>	Corrupt officials Political elites
<b>Immediate Harm</b>	Some clients (deficient service)
<b>Broader Impact</b>	Revenue and asset losses Public sector wage bill balloons Public services deteriorate Damaged legitimacy Deficits and debt grow
<b>Causes</b>	No inventory control Lack/evasion of appointment and hiring checks Weak accounting systems Vague job descriptions and standards Low pay and penalties Patronage networks in civil service
<b>Responses</b>	Computerize inventories and accounts Audits, surveillance Reform hiring and appointments Ethics codes Raise pay and penalties Decentralization with accountability
<b>Feasibility</b>	Big windfalls for top officials Party machine and patronage network resist Need integrity at the top Need civil service reform "Rational ignorance" by citizens But -- could be a "hot button" issue

**Feasibility:** While this area may not be as intractable as government procurement, reforms will still face the resistance of entrenched public sector and political interests. The private sector and the populace might at least be neutral, since they are not directly implicated in these activities. On the other hand, mobilizing their support for reform would require overcoming ignorance and perhaps apathy.

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<sup>24</sup>*Id.*

Misappropriation of public resources is a crime that does not inflict damage directly on private citizens, but spreads the costs of lost resources over the whole economy.<sup>25</sup> However, "illicit enrichment" has been a political "hot button," and accusations of it appear regularly in the press, including in Africa.

The informational problems here are daunting. Few people in any country have a clear idea of how public resources are used -- and this is especially so in Africa, where most budget and expenditure allocation processes are non-transparent and subject to discretion. One of the keys that could enable an aroused public to unlock reform in this area is a more transparent public finance system, where revenue, expenditure, and budget information are easily available to watchdog groups and researchers. This would provide some basis for evaluating the use of public resources. This transparency should extend to donor grants and international loan funds -- an area where the international donor community will need to commit itself to coordinate its efforts and work with recipient governments. As always, the ultimate conditions *sine qua non* for success are commitment at the top, constitutional guarantees, and autonomous, professional judges and civil servants.

### ***Combating Corruption through Institutional Change***

It is clear from the preceding discussion that taming corruption requires a commitment to change at the very top as a threshold condition. Once this condition is satisfied, reformist leaders will need some combination of popular, private sector, and international support to implement the necessary institutional changes. Moral commitments by the leadership are a necessary but not sufficient condition. In order to get the problem under control, leaders need the skill and vision to redesign public institutions in ways that minimize and punish corruption, and a political strategy for putting these changes in place. This section of the paper reviews the long-term macro-level institutions usually needed to sustain reform, and goes on to discuss some practical approaches that could help reduce the scale of corruption in the near term in African countries. Both parts of this discussion are based on, and elaborate upon, the institutional reform reposes presented in the analysis of corruption above. In the same way that these general recommendations grow out of an analysis of particular problems of corruption, reforms that may actually be adopted in Africa will need to be developed not from a standard blueprint, but from a careful analysis of the dynamics involved in specific forms of corruption.

#### ***The Big Picture***

What are the essential steps required to control corruption in the long term? The exact nature of these will depend on the society, but there are a few core elements that are likely to be important anywhere:

***Restructuring the public sector:*** Even apart from the economic policy aspects of heavy state regulation and involvement in productive and allocative activities, it would be very difficult for societies in Africa to get control over corruption without restructuring. The wider the reach of the state, the greater the potential for corruption. To take the extreme example, the Stalinist system required the state to process massive amounts of information about demand, the meeting of production quotas, the distribution of supply,

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<sup>25</sup>This is the problem of "rational ignorance," where the individual citizen would have to expend more effort to understand and attack the problem than he/she would gain if the system were reformed. M Olson, *The Rise and Decline of Nations* p. 25-29 (1982).

and the administration of the system at every level. Such a system presents huge opportunities for agents of the state to steal productive assets, pocket revenues, and demand bribes for the allocation of goods and services. In practice, the Stalinist system ran relatively cleanly only when there was a chief of state willing to keep his official agents in check through terror. In present-day Africa, the residue of the statist system, in the form of state enterprises, parastatal distribution networks, and licensing regimes, presents the same temptations to agents of government. Neither the chief of state nor the public have sufficient information nor the means of control effectively to impose accountability.

When the state engages in production and exchange, it does so essentially as a fiduciary representative of the people. Because such activity is carried out indirectly through the medium of the state, and because the agents of the state are handling "someone else's" money or property, oversight is necessary. Agents of the state and third parties could be tempted to siphon off the value of money or property they are handling in the name of the people. They can do so while suffering virtually no direct loss and appropriating a much larger value directly through bribery or theft.<sup>26</sup> Of course, non-market allocation mechanisms through the public sector also run up against the interests of private actors in exchanging value for their desired result. The more frequent this is, the harder it becomes to stop corruption.

By contrast, a "minimalist" state, that provides no more than essential public services and enforces the law, could avoid many of these problems. If resources are allocated according to market criteria, and the state does little more than provide mechanisms to enforce contract and property rights, then it would be left to the citizens to invoke those rights. In this case, property owners, shareholders, entrepreneurs, and people who sell their productive labor would have an interest in safeguarding the value of their assets and in bargaining for the best exchange. Here, the state still exercises power, but does so primarily as an adjudicator of private rights, and less frequently as an allocator of benefits.

Countries all over the world have undergone public sector restructuring for these reasons, and for the economic benefits expected. In Africa, the pandemic of public sector corruption makes such changes especially urgent. This becomes even more important in view of the fact that African states are overextended. Their resources do not permit them to do well all of the tasks they have set for the public sector, and particularly to exercise adequate control of the use of public sector assets -- in short, to restrain incompetence and corruption. Where regulations and public sector services have been retrenched, one should expect, other things equal, a decline in corruption. Conversely, in Eastern Europe, for example, there is increasing evidence that old-line governments' delay in tackling public sector reform has helped perpetuate higher levels of corruption than exists in countries that have reformed more quickly.<sup>27</sup>

***Strengthening administrative law:*** A major step towards restraining bureaucratic discretion and ensuring accountability would be the introduction of an effective system of rulemaking procedures, including public notice and comment, and administrative appeals against adverse findings and irregularities. Administrative appeal depends on the initiative of aggrieved applicants to invoke rules of accountability against officials. Administrative law systems in African countries have generally not kept pace with the

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<sup>26</sup>M. Olson, "Capitalism, Socialism, and Dictatorship" (manuscript, 1996).

<sup>27</sup>D. Kaufman and P. Siegelbaum, "Privatization and Corruption in the Transition" (draft paper, 1996).

development of administrative law in industrialized countries. African systems reflect (i) the colonial systems' intent to discourage recourse against the government by the population, (ii) the fact that the colonial systems were created at an early point in the modern development of administrative law, and (iii) the residue of socialist or revolutionary legality, which often did not countenance citizen objections to administrative action.<sup>28</sup> African systems vary on this point, though most appear to provide for administrative appeal, in principle. The task in any given African country may be to create, revive, reform, or strengthen these avenues of appeal.

Administrative rulemaking in much of Africa is in practice opaque and subject to little or no outside review. In some systems, the underlying problems are an unclear division of powers between the legislative and executive branch, and a tendency toward loosely worded statutes. Each of these tendencies places vast discretionary powers in the hands of presidents and ministers to rule by decree. Coming to grips with these requires that political checks and balances exist, which are translated into a system of administrative law that is in fact used to discipline policy implementation. Then, transparent rulemaking and review by courts or tribunals will establish a routine expectation that officials can be called upon to justify their decisions.

***Professional and politically neutral civil service:*** A civil service that is competent, functions according to a professional service ethic, and is not at the mercy of political and market forces operating around it, is a fundamental condition for governmental integrity in the long term. Appointment procedures, training standards and programs, and salary levels will be key to its success. All of these elements will need constant attention. Once salaries are allowed to be eroded by inflation, the covenant by which a good civil service lives, namely professional treatment and a living wage in return for honest and competent work, is in jeopardy. As stated earlier, one needs to begin at the top, in order to pre-empt or break any high-level corruption and establish a standard of integrity. The program cannot stop there, however, and will need to spread and continue to monitor each level of the civil service. A professionalized and reasonably paid civil service is unlikely to permit systemic bribery or predation. The temptation of large gains from corruption in areas like procurement is always present, but a combination of commitment to integrity at the top, functioning procurement bid and inspection systems, the readiness to apply tough criminal sanctions, and a professional ethic among public servants themselves can contain outbreaks of corruption and ensure that they are at most isolated scandals.

Examples of rapid and determined reform of the civil service in developing societies are provided by Singapore and Malaysia. In each case, top leadership made a commitment to achieve shared economic growth, and determined that one part of the plan needed to be clean, or at least competent and predictable, governance. Part of the program was the establishment of an elite cadre of civil servants who would take the lead in implementing economic policy at high levels -- without political interference. This required wholesale changes in public sector appointments procedures, and in the salary packages and qualifications of bureaucrats. A clear signal was also sent that corruption would not be tolerated. In each case, leadership changed the moral and professional tenor of the public service, and made it clear that corruption would be a

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<sup>28</sup>R. Abel, "Western Courts in Non-Western Settings: Patterns of Court Use in Colonial and New-Colonial Africa," in Burman and Harrell-Bond, *The Imposition of Law* (1979); S. Kahkonen and P. Meagher, "Legal Institutions and Efficient Contracting in Africa" *op. cit.* (1997).

high-risk activity.<sup>29</sup>

**Credible audit and oversight institutions:** These are especially important in combatting the misappropriation of public resources, which is a debilitating problem in many African countries. The real problem in most of these countries is not the absence of such systems, but the fact that either they are politically compromised, or that they ultimately report back to the executive branch, and their findings can be buried. In addition to their lack of independence, most suffer as well from a shortage of resources and qualified people, which compromises their ability to investigate and to gain an understanding of the use of public resources from the data provided. When the political leadership makes a commitment to reform the system, ways can be found to address the technical problems. A much bigger issue is taking this to its natural conclusion: providing real autonomy to audit institutions, providing them the power to institute investigations and to sanction those who do not provide timely and complete records, and pursuing the prosecution of high officials who may be political supporters in cases of malfeasance.

One way to assure effective independence to audit institutions is to have them report to parliament rather than the executive. This is not a guarantee of success, particularly where one party dominates in both branches of government, and the interests of the executive and legislature are aligned. This, however, is less and less the case, even in Africa. Legislators serve their constituents. Often, this goes hand-in-hand with political careerism that requires ambitious politicians to seize opportunities to put their names in the newspaper headlines. Exercising oversight over executive department policy implementation and expenditures, especially when this means exposing incompetence or corruption, provides a short-cut to political notoriety. Ugly as it may seem, it may be worth supporting this process by having audit institutions, and such other watchdog bodies as an ombudsman or an anti-corruption agency, report to parliament and provide it opportunities to hold the executive publicly accountable. However, these systems are in their infancy across much of Africa. Parliaments and audit institutions will need more autonomy, more resources, and more experience before they are effective watchdogs.<sup>30</sup>

**Competent and independent judicial institutions:** The quality and independence of judicial institutions is fundamental, not only for the proper adjudication of disputes, but for accountability across the entire system of governance. As explained above, the reputation of the judiciary for independence, competence, and integrity can have a widespread impact on the legitimacy of the government and the legal system, the level of voluntary compliance with the law, and the level and quality of investment. The independence of the judiciary is the cornerstone, and determines many other factors such as professionalism and the ability to attract competent jurists to the bench. The same applies to the procuracy. If prosecutors are routinely pressured to drop politically sensitive cases, then the reputation of the institution -- and with it the credibility of the government -- suffers, and it will be increasingly difficult to find competent and principled

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<sup>29</sup>H. Root, *Small Countries, Big Lessons: Governance and the Rise of East Asia* p. 42-51, 65-89 (1996).

<sup>30</sup>Both Uganda and Tanzania have recently strengthened their Auditor General offices. Each of these produces public reports that are reviewed by Parliamentary committees. They both face challenges to their effectiveness as well. IRIS, *Governance and the Economy in Africa* op cit. P. 93-117 (1996); R. Staphenurst and S. Kpundeh (eds.), "Fighting Corruption: Lessons of Experience" (Draft, EDI Seminar Series, 1997).

attorneys to staff the prosecutors' offices. Like members of parliamentary oversight committees, prosecutors can build their careers by exposing corruption in government, and bringing successful prosecutions. This is another area where personal ambition sometimes aligns with the interests of accountability.

With regard to both judges and prosecutors, the key issues will be, first to ensure that their appointment, their promotion, and the determination of their working conditions are not dominated by the executive, and second, to provide them sufficient powers and means in such areas as service of process, subpoena, and contempt, so that they can actually impose accountability. Also important are training institutions and career tracks.

This discussion has not placed much emphasis on certain issues that commonly arise in discussions of the fight against corruption, namely toughening criminal penalties and establishing anti-corruption agencies. The reasons are straightforward. First, there are already criminal penalties on the books. These doubtless could be improved -- and indeed some attention to the drafting of laws expanding the grounds for prosecution of corruption and perhaps allowing new kinds of evidence or presumptions, is warranted. In the United States, prosecuting corruption cases has been helped by the enactment of new federal criminal laws in the 1960s and 1970s.<sup>31</sup> However, in most cases the urgent priority is making the threat that existing penalties will be applied realistic, and ensuring their principled application.

As for anti-corruption agencies, these can be either catalysts for real change, or paper tigers. The major factor here as well is the level of autonomy and the reporting relationships. There are several models, including the investigative commission, the coordinating body, and the investigative and prosecutorial agency. Hong Kong and Singapore transformed themselves from sinkholes of corruption to models of clean and efficient administration with strategies that included revamping the civil service and establishing anti-corruption agencies with investigative, coordinating, and public relations functions.<sup>32</sup> Uganda has set up a strong Inspector General of Government, which reports to the President. It has been suggested that this office be made autonomous, but for now, with the President's backing, the IGG has successfully brought several major corruption cases to light.<sup>33</sup>

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<sup>31</sup>A leading example is the Racketeer-Influenced and Corrupt Organizations (RICO) legislation.

<sup>32</sup>Klitgaard, *Controlling Corruption* *op. cit.* p. 98-121 (9188); Stapenhurst and Kpundeh, "Fighting Corruption" *op. cit.*

<sup>33</sup>By contrast, the Tanzania Prevention of Corruption Bureau, which also reports to the President, has not had the support or the autonomy to carry out its mandate as effectively. *Id.*, IRIS, *Governance and the Economy in Africa* p. 93-117 (1996).

### ***Near-Term Targets for Institutional Reform***

Once a country's leadership has taken the path of reform, it will be engaged in a long-term process of building or strengthening essential institutions of governance. What steps might be taken in the interim, to help hold corruption in check, to deliver some of the benefits of good governance quickly, and to provide structures to translate political changes into improved day-to-day practice? This section focuses on examples of smaller-scale institutional reforms that can help tame corruption. In each case, the measures discussed provide mechanisms for those harmed or potentially harmed by corruption to monitor activities that might involve corruption, or to complain. By institutionalizing a justiciable *right* to clean government -- on the part of private citizens as well as public officials who suffer when corruption diminishes the effectiveness and reputation of the government -- these measures help align private incentives with the public interest in governmental integrity. They also provide means by which individuals and groups outside government can invoke and cooperate with core governance institutions, once they are fully operational, to prevent or remedy abuses.

***Transparency and the right to information:*** Information relevant to policymaking and bureaucratic action should be subject to a citizen *right to information* that is enforceable at law. Most countries, including those in Africa, do make the legal effectiveness of new laws contingent on their official publication. However, this is not always the case with regulatory enactments of the president, ministries, or agencies. Moreover, once they have been published, these enactments are often difficult to obtain, especially outside the capital. Finding accurate and up-to-date figures on government budgets, tax receipts, and expenditures is even more difficult. Information is the threshold requirement for oversight agencies and citizens to hold the government accountable. This means there should be strict requirements that all enactments of whatever kind, and all budgets, be published and subject to public review and comment, *before* they become effective. Judicial and agency decisions in particular cases should be published as well. Of course, official audit and oversight mechanisms need automatic access to all government information, including that of a sensitive or confidential nature. Other information relevant to the public interest in government decisionmaking and expenditures should be available under freedom of information procedures.<sup>34</sup> In countries where such procedures exist, these are critical to the success of the press and non governmental watchdogs in holding government accountable for its actions. Rights to free expression, and a free press, would have to be guaranteed for governmental transparency to be effective.

African countries with few means at their disposal could find alternative ways to meet these needs. These might include setting up a simple archive of hard copy documents, and perhaps computer archives as well, where all required information is available to the public. Costs could be shared, or perhaps aspects of this function could be handled by private firms. The major commitment on the part of the government here would not be to change policies substantively, but to conduct its business in the open.

***Competition in the provision of public goods and services:*** Providing access to government permits or services through alternative sources with overlapping authority -- whether public or private sector -- gives the citizen an exit option, i.e. the alternative of going to another source that is cleaner, more efficient, or cheaper. Simple examples exist in Western countries: one can obtain the same passport from any passport office in the United States; postal services are available at numerous branches in any given area, and private sector express mail and courier services provide additional options. The virtue of competition, of course, is

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<sup>34</sup>Models of these exist in the U.S. and the Scandinavian countries. Transparency International, *National Integrity Systems op. cit.* p. 93-102 (1996).



that it imposes downward pressure on prices and encourages quality and efficiency. In public sector agencies without any profit motive, this is less true, but in the right circumstances it should dampen bribery and predation, and indeed profit-like incentive structures could be established to put upward pressure on the quality and efficiency of services. This approach, no doubt, would pose significant challenges to most African countries, especially outside the capital, where populations are spread out and services are thin. The feasibility of this kind of option is likely to depend on the development of infrastructure in the interior, the status of decentralization, openness to cross-border competition, and other factors.

***Self-policing by a competitive private sector:*** Corruption that results in illicit benefits to one firm often harms its competitors. Examples include the unlawful giving of tax breaks, zoning variances, monopolies and concessions, and public works contracts. In each of these cases at least two options are available that would empower competitors in an industry to police each other's behavior. The first is governmental complaint procedures -- the clearest example here would be bid protests in the procurement field. In this example, competing firms who have lost a government contracting competition can protest to an appeal board that oversees the procurement authority, and if there is evidence of irregularity, an investigation can be launched. These procedures exist in some form in most countries, although their level of real effectiveness varies. One might adopt a similar approach in other areas. In all such cases, the incentives of private firms to protect their competitive advantages align in some way with the public interest in governmental integrity, with the result that firms and public sector watchdogs work in tandem to control corruption. The obvious caveat here is that these procedures may lend themselves to overuse and abuse, unless they are carefully crafted to filter out most non-meritorious complaints.

The alternative to this would be a non-governmental policing mechanism. Here, firms might sign a non-bribery pledge. Members who are found to have violated it are either reported to the authorities or denied some group benefit -- for example, membership in the chamber of commerce, or a "seal of approval" that, by prior agreement with the authorities, allows the firm to compete for government contracts. One version of this is the "island of integrity" approach advocated by Transparency International.

***Complaint and appeal procedures:*** These procedures enable people to complain when they are aggrieved by government action or omission against themselves. They are especially important in litigation and in areas such as investment approval, that may be subject to predation by judges or bureaucrats. In any area, the professionalism and integrity of the judge or administrative tribunal member who hears the appeal is fundamentally important. In order for these procedures to help strengthen integrity, they must be known and available to all citizens who have a complaint against bureaucratic action, and they must carry with them the assurance that the complainant will not be subject to retaliation. They would also need to be introduced along with real efforts to improve the professionalism of the public service, and the rotation of public service personnel between posts in different parts of the country.

***Citizen suits:*** These are suits against the government aimed at forcing it to perform required functions. They have, for example, been used everywhere from the U.S. to India to require governments to implement environmental protections, to carry out clean-ups, and to impose liability on polluters. In the U.S., these are sometimes called "private attorney general" suits, and have arisen in several areas, including the fight against corruption.<sup>35</sup> Both here and in the preceding examples, the main requirement of the government

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<sup>35</sup>An example is the "qui tam" suits brought by government contractors alleging fraud by competing contractors. L. Victorino, R. Ivey, and K. Sullivan, "Qui Tam' Lawsuits" (Federal Publications Briefing

would not be immediate changes in policy, but rather to establish or strengthen procedures that would allow citizens to hold the government to its existing commitments. The extent to which these can become frequently-used tools will depend on the limits on issues that are justiciable, and on standing, i.e. ability to sue.

**Supportive legal framework for nongovernmental watchdog groups:** The ability of citizens to invoke many of the remedies discussed above will depend on the existence of watchdog groups, legal aid organizations, industry associations, and other NGOs that act on issues of concern to private citizens and business organizations. The key here will be the array of legal provisions concerning the establishment of associations and non-profit corporations, the protection of civil rights, and charitable tax exemptions. Most important in many African countries are the basic procedures for establishing and operating such organizations. The applicable laws all too often unduly restrict the scope of activities of these organizations, and submit them to continuing supervision by ministries of interior. Governmental accountability is best served by having a diverse array of watchdogs, all of whose prestige and continued existence depend on their ability to expose and fight abuses in the government. (This, of course, would also include the press, which should be free of prior restraints, intimidation, and content-based licensing restrictions.)

**Whistleblower protections:** Not only private citizens but public servants themselves should be encouraged to act as watchdogs. Auditors, legislative oversight committees, judges, inspectors of government, and others make careers out of this. However, line bureaucrats themselves can play important roles as bulwarks of accountability, both through their example and by reporting misdeeds by their peers or superiors. Assuming that civil servants enjoy a living wage and some level of professionalism, the biggest threat to the virtue of a well-intentioned official is extortion and blackmail by co-workers who want him or her to go along with, keep secret, or even participate in, a pattern of corruption. This kind of pressure has appeared everywhere, from the police departments in the U.S. to the bureaucracies of many industrialized and developing countries.<sup>36</sup> The official who performs his or her own duties in good faith and is concerned about the professional integrity and reputation of the public service can be a powerful force for good -- if appropriately encouraged and protected.

One important form of protection would be a program of procedures and protections for "whistleblowers," i.e. people who report abuses committed in their agencies. This is a step that can carry the risk of dismissal, intimidation, or worse. A program of information, encouragement, and protection could help tap the energies of honest civil servants in policing their colleagues. Like many of the instruments mentioned here, this one carries with it the potential for abuse if not properly designed and administered. The important point is that whistleblowers are needed as sources of *information*, not as tools for the denunciation of the unpopular. Once such information is available, it is the duty of government inspectors and prosecutors

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Paper, 1989). See also E. Chemerinsky, "Controlling Fraud Against the Government: The Need for Decentralized Enforcement," *Notre Dame Law Review* vol. 58, p. 995 (June 1983).

<sup>36</sup>A famous U.S. example is the Serpico case, involving the New York City police department. See, S. Jasanoff and R. Stone, "The Knapp Commission and Patrick Murphy." (Case study, Kennedy School of Government, Harvard University, 1977).

to evaluate it competently and take any appropriate action.<sup>37</sup>

### **Conclusion**

This discussion has been premised on certain preconditions. One, mentioned previously, is integrity and commitment to change by top leadership. This would need to be accompanied by an effective partnership between the political leadership and civil society in carrying out reforms, as well as political checks and balances. Legal institutions, including a democratic constitution, are not self-operating. They reflect, and in turn are put into operation by, a certain balance of political forces. Authoritarian political leadership that dominates all institutions of the state and ignores or muzzles nongovernmental dissent, will not allow for disciplined governance in the public sector. This is not to say that there is a specific political system that best controls corruption. However, some counterweight, in the form of an opposition political formation, or even an organized private sector that participates in policy decisions and is capable of holding the government accountable, is essential.

In the end, the ability to keep corruption in check is an important part of a government's credibility, along with the capacity to implement rational macroeconomic policies, and to sustain a market-enhancing legal and regulatory environment. This kind of credibility is rapidly becoming a basic standard of the competitive international investment environment, and is increasingly acknowledged as a prerequisite for stable and broad-based economic growth. Clean and credible governance, like technology, is one of the "big bills left on the sidewalk"<sup>38</sup> that, if picked up, can enhance the comparative advantage and the economic prospects of African countries with astute leadership.

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<sup>37</sup>Whistleblower protections are a recent development and are only now being established in Western countries such as the U.S. and U.K. Transparency International, *National Integrity Systems* p. 45-47 (1996).

<sup>38</sup>M. Olson, "Big Bills Left on the Sidewalk: Why Some Nations are Rich and Others Poor," *Journal of Economic Perspectives* Vol. 10, no. 2 (1996).